FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 787

STATE ATHLETIC COMMISSION,
Appellant,

versus

JOSEPH DORSEY, JR.,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans Division.

OPPOSITION TO MOTION TO AFFIRM.

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OPPOSITION TO MOTION TO AFFIRM.

Appellant in the above entitled case reaffirms its position that this matter is one of great legal significance since it raises substantial and timely questions which have never been decided directly by this Court, the answers to which will provide guide posts to future state-federal relations.

REASONS FOR DENYING THE MOTION.

I.

Appellee cited several United States Supreme Court cases to support his contention that the District Court has the right to entertain jurisdiction of a suit against a

state agency, despite the fact that the state had not granted permission for such agency to be sued. These cases cited are not apposite. In all of these cases either the agency sued had been previously granted the authority to sue or be sued[1] or natural persons had been sued.[2]

Appellee places great weight and significance upon the case of *School Board of the City of Charlottesville v. Allen*, 240 F. (2d) 59. Appellant herein seriously questions the validity of the reasoning used by the Court in arriving at its decision.

First of all, the Court felt that there is no distinction between an individual government official and/or officials and a corporate agency of the state. Upon careful analization, the distinction is apparent. The State Official has two component parts: first, he is a natural person, and secondly, there is his official representative character of which, according to the doctrine enunciated in *Ex parte Young*, 209 U. S. 123 (1908), he is stripped in order that his person be subject to the consequences arising from his conduct. The State Agency, on the other hand, has nothing more or less than its representative capacity and should that be torn asunder, nothing remains against which the Court may act.

The second premise used by the Court in the *Charlottesville* case is equally untenable. The Court therein decided that since the question had not been raised in the

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[1] Hopkins v. Clemson Agricultural College, 221 U. S. 636 (1911); Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corporation, 258 U. S. 549 (1922).

[2] Sterling v. Constantin, 287 U. S. 378 (1932); Home Telephone and Telegraph Co. v. City of Los Angeles, 227 U. S. 278 (1913).

Brown v. Board of Education case the Supreme Court must have decided that this procedure was legally correct.

Pretermitting the question as to whether or not silence on the part of the Supreme Court can create judicial precedent, there are two good reasons why the question was not asked nor answered. First, under the laws of Kansas, the school board has the right to sue and be sued.[3] Secondly, even if the right to sue were not granted, the immunity and privilege was waived by not urging the same.[4]

II.

Appellant concedes herein as it has already done in its jurisdictional statement that there are many phases in which this Court has applied the equal protection clause of the United States Constitution. However, appellant reaffirms its position taken in the jurisdictional statement that the matter herein concerned is not one which should or may be determined by the equal protection clause to the United States Constitution.

The cases cited by appellee with regard to opportunity to be gainfully employed deal with matters in which the type of employment is general and usual,[5] rather than specific and unusual, or in which the law is not applied equally to all persons in the field of endeavor.[6]

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[3] General Statutes of Kansas, 72:1612.

[4] Missouri v. Fiske, 290 U. S. 19; Clark v. Barnard, 108 U. S. 436; Gunter v. Atlantic Coastline R. Co., 200 U. S. 273; Cunningham v. Macon and Brunswick R. Co., 109 U. S. 446.

[5] Truax v. Raich, 239 U. S. 33, 41 (1915).

[6] Yick Wo v. Hopkins, 118 U. S. 356 (1886).

CONCLUSION.

For the foregoing reasons, the questions presented by Appellant herein are clearly substantial and timely, and are of such a nature that they should be decided by this Court after oral argument by the parties involved.

Respectfully submitted,

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PROOF OF SERVICE.

I, William P. Schuler, one of the attorneys for Louisiana State Athletic Commission, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of May, 1959, copies of the foregoing Opposition to Motion to Affirm were served on the plaintiff herein by mailing same in duly addressed envelopes with first class postage prepaid to his attorneys of record, as follows:

To Louis Berry,
4226 South Central Avenue,
Los Angeles 11, California (Air Mail);

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10 Columbus Circle,
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.....

WILLIAM P. SCHULER,
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State of Louisiana.